A **DATO' SHAHABUDIN SHAFIE & ANOR v. MIHAT SHAARI**

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[CIVIL SUIT NO: 22NCVC-08-02-2016]
14 MAY 2017

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CIVIL PROCEDURE: *Summary disposal order – Rules of Court 2012, O. 14A – Disposal of case on point of law – Dismissal from position of Chief Operations Officer – Whether dismissal void for non-compliance of Statutory Bodies (Discipline and Surcharge) (Kedah) Enactment 2003 – Whether Menteri Besar Incorporation a statutory body – Whether there was necessity for Disciplinary Committee to be appointed – Whether Statutory Bodies (Discipline and Surcharge) (Kedah) Enactment 2003 applicable – Whether given right to be heard before dismissal*

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The plaintiff was previously employed by the second defendant as its Chief Operations Officer. The second defendant was incorporated under the Menteri Besar Kedah Darul Aman (Incorporation) Enactment, Enactment No. 5 of 1988. The first defendant was the Chief Executive Officer of the second defendant who issued the plaintiff's dismissal letter on disciplinary grounds. The plaintiff contended that his dismissal was unlawful and therefore by this writ action sought, amongst other reliefs, a declaration that his dismissal was void. The plaintiff then filed an interlocutory application *vide* encl. 15 pursuant to O. 14A of the Rules of Court 2012 ('the ROC'). The plaintiff's sole contention was that his dismissal was void for non-compliance of the Statutory Bodies (Discipline and Surcharge) (Kedah) Enactment 2003 ('the 2003 Enactment') in that there was a failure to appoint a valid Disciplinary Committee before he was dismissed as required under the 2003 Enactment. On the contrary, the defendants contended that (i) the Menteri Besar Incorporation was not a statutory body for the purpose of the 2003 Enactment, hence, there was no necessity for the Disciplinary Committee to be appointed as the 2003 Enactment was not applicable; and (ii) non-compliance in respect of the constitution of the Disciplinary Committee was immaterial as the appointment of the legal firm, Messrs Aswandi Hashim & Co, consented to by the then Menteri Besar stood in the place of the required panel members of the Disciplinary Committee. The issues that arose for determination, *inter alia*, were (i) whether the plaintiff's dismissal was subjected to the 2003 Enactment; and (ii) whether the alleged non-compliance rendered the plaintiff's dismissal void.

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Held (allowing encl. 15 with costs):

(1) As the plaintiff's dismissal was premised on his alleged indiscipline, his dismissal must comply with the Regulations made under the 2003 Enactment. Under the Regulations, when a complaint of a breach of discipline arises, the Chairman of the appropriate Disciplinary

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Committee has to determine the seriousness of the alleged breach. If the said Chairman is of the view that it is a breach which warrants a punishment of dismissal or reduction in rank, he is obliged to refer the case to the appropriate Disciplinary Committee. This is in compliance with reg. 33 of the Second Schedule of the 2003 Enactment. (paras 14 & 16)

(2) Pursuant to reg. 35, the appropriate Disciplinary Committee must then consider all the available information and determine whether there is a *prima facie* case against the officer. In the event that the Disciplinary Committee finds that there is, the Disciplinary Committee is required to provide the officer concerned with the charge. The officer shall then be given 21 days from the day that he receives the charge to make written representation to exculpate himself for the consideration of the appropriate Disciplinary Committee. However, in the plaintiff's case, no such Disciplinary Committee was constituted. In the circumstances, there was a blatant breach by the defendants of s. 6 of the 2003 Enactment and reg. 35. (paras 17, 20 & 23)

(3) The fact that Messrs Aswandi Hashim & Co stood in the place of the required panel members mentioned clearly meant that there was no appropriate Disciplinary Committee to inquire into the plaintiff's dismissal. It therefore followed that the plaintiff was never given a right to be heard before he was dismissed. The 'body' which determined his dismissal was obviously without powers to do so. Accordingly, the plaintiff's dismissal was void. (paras 23 & 25)

Case(s) referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Legislation referred to:

Enakmen Perbadanan Menteri Besar Kedah Darulaman 1988, s. 3
Federal Constitution, arts. 140(1), 144(1)
Rules of Court 2012, O. 14A, O. 53
Statutory Bodies (Discipline and Surcharge) (Kedah) Enactment 2003, ss. 2, 4, 5, 6, First Schedule, Second Schedule rr. 33, 35, 40, Third Schedule

For the appellants - Siti Rafidah Abdul Raof; M/s Aswandi Hashim & Co
For the defendant - Ahmad Farid Hj Zakaria; M/s Ahmad Farid & Assocs

Reported by Sandra Gabriel

JUDGMENT

Chan Jit Li JC:

[1] The plaintiff in this case was previously employed by the second defendant as its Chief Operations Officer.

[2] The first defendant is the Chief Executive Officer of the second defendant who issued the plaintiff's dismissal letter.

[3] The second defendant was incorporated under the Menteri Besar Kedah Darulaman (Incorporation) Enactment, Enactment No. 5 of 1988. Section 3 of the Enactment states:

Incorporation of Menteri Besar

(1) The Officer for the time being discharging the duties of Menteri Besar, Kedah Darulaman, and his successors in office, shall be a body corporate under the name of 'Menteri Besar, Kedah Darulaman' (hereinafter called 'the Corporation').

[4] The plaintiff was dismissed on 20 February 2013 on disciplinary grounds. He contends that his dismissal was unlawful and therefore by this writ action seeks, amongst other reliefs, a declaration that his dismissal is void.

[5] On 23 August 2016, the plaintiff filed the instant interlocutory application pursuant to O. 14A of the Rules of Court 2012 (ROC) (encl. 15.)

[6] Order 14A reads as follows:

Determination of questions of law or construction (O. 14A, r. 1)

1. (1) The Court may, upon the application of a party or on its motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) Such question is suitable for determination without the full trial of the action; and

(b) Such determination will finally determine the entire cause or matter or any claim or issue therein.

[7] On the date of the hearing of encl. 15, Cik Siti Rafidah bt Abdul Raof (Cik Siti), learned counsel for the defendants, informed the court that she conceded that the dispute in this case could be expeditiously disposed of by way of an O. 14A application.

[8] The parties also agreed to the following facts:

1. Plaintif ialah Ketua Pegawai Operasi dalam Defendan Kedua iaitu majikannya, sebuah badan yang diperbadankan di bawah Enakmen Perbadanan Menteri Besar, Kedah Darul Aman 1988.

2. Pada 17/01/2013, Plaintif menerima surat tunjuk sebab dan penggantungan tugas bertarikh 15/01/2013 di atas tuduhan beberapa perbuatan salah laku. Surat bertarikh 15/01/2013 ditandatangani oleh Defendan Pertama sebagai Ketua Pegawai Eksekutif dalam Defendan Kedua dan salinannya dipanjangkan kepada Tetuan Aswandi Hashim & Co, peguam bela dan peguam cara.

3. Menerusi suatu surat bertarikh 23/01/2013, Plaintif menjawab surat tunjuk sebab bertarikh 15/01/2013 tersebut.

4. Berikutnya Plaintif telah diarahkan untuk menghadiri suatu Siasatan Dalaman ("Domestic Inquiry") yang ditetapkan pada 05/02/2013.

5. Siasatan Dalaman tersebut dianggotai oleh kakitangan-kakitangan dan/atau wakil daripada Tetuan Aswandi Hashim & Co, peguam bela dan peguam cara beralamat di No. 71 & 72, 2nd Floor, Kompleks Perniagaan Sultan Abdul Hamid, Persiaran Sultan Abdul Hamid, 05090 Alor Setar, Kedah.

6. Melalui surat bertarikh 20/02/2013 yang ditandatangani oleh Defendan Pertama, Plaintif dimaklumkan bahawa dia (Plaintif) telah didapati bersalah dan diberhentikan kerja dengan serta merta.

7. Sejak diberhentikan kerja, Plaintif tidak menerima apa-apa emolument.

[9] The plaintiff's sole contention is that his dismissal is void for non-compliance of the Statutory Bodies (Discipline and Surcharge) (Kedah) Enactment 2003 ('2003 Enactment') in that there was a failure to appoint a valid Disciplinary Committee before he was dismissed as required under the 2003 Enactment.

[10] In reply, Cik Siti contends that the Menteri Besar Incorporation is not a statutory body for the purpose of the 2003 Enactment. Hence, there was no necessity for the Disciplinary Committee to be appointed as the 2003 Enactment is not applicable. She submits as follows:

10. Dihujahkan bahawa Enakmen BBK 2003 tidak pernah dijadikan sebagai ekshibit dalam permohonan plaintif di bawah tindakan ini. Adalah menjadi prinsip undang-undang yang mantap bahawa pihak-pihak terikat pada plidingnya.

11. Seterusnya, mengenai tafsiran badan berkanun, iaitu suatu badan badan, walau dengan nama apa pun yang disebut, yang diperbadankan oleh undang-undang Negeri bagi maksud Kerajaan Negeri, tetapi tidak termasuk pihak berkuasa tempatan.

12. Defendan-defendan menghujahkan bahawa defendan kedua bukan satu badan berkanun yang diiktiraf di negeri Kedah khususnya, iaitu hanya sebelas (11) badan berkanun disenaraikan; antaranya Lembaga Kemajuan wilayah Kedah (KEDA). Lembaga Kemajuan Pertanian Muda (MADA), Perbadanan Kemajuan Negeri Kedah dan Universiti Utara Malaysia. Sumber daripada [http://ekerjayaanda.blogspot.my/2011/05/kenali-badan-berkanun-di-malaysia.html]

13. Dalam hal ini dihujahkan bahawa defendan kedua tidak terpakai dan tidak tertakluk kepada Enakmen BBK 2003 dengan alasan berikut:

i] Defendan-defendan mengguna pakai Enakmen Perbadanan Menteri Besar Kedah Darulaman 1988.[Bil. 5 tahun 1988] [Selepas ini dirujuk sebagai Enakmen Perbadanan Menteri Besar]

A ii] Kewujudan atau mengadakan defendant kedua adalah mengikut Enakmen Perbadanan Menteri Besar; suatu Enakmen untuk mengadakan Perbadanan Menteri Besar, Kedah Darul Aman.

B iii] Enakmen Perbadanan Menteri Besar hanya menyebut mengenai kuasa Menteri Besar, pegawai pada masa itu yang menjalankan tugas-tugas Menteri Besar, Kedah Darul Aman dan penggantinya hendaklah menjadi sebuah perbadanan di bawah nama Menteri Besar, Kedah Darul Aman dan disebut Perbadanan.

C iv] Menteri Besar, Kedah Darul Aman telah diputuskan bukan 'a public officer', sebaliknya adalah perbadanan yang ditubuhkan di bawah Enakmen Perbadanan Menteri Besar Kedah Darulaman 1988. … Disebabkan Menteri Besar, Kedah Darul Aman bukan, maka pegawai-pegawai di dalam Defendan Kedua juga bukanlah 'a public officer' dan tidak terikat dengan Enakmen BBK 2003.

D **[11]** Thus, before determining whether the alleged non-compliance renders the plaintiff's dismissal void, it is necessary for me to first determine whether or not the 2003 Enactment applies.

(i) Is The Plaintiff's Dismissal Subjected To The 2003 Enactment?

[12] Section 2 of the 2003 Enactment provides that:

E **Application**

2 (1) This Enactment shall apply to all statutory bodies except the statutory bodies listed in the First Schedule.

Section 4 of the same Enactment defines 'statutory body' as follows:

F **Interpretation**

'statutory body' means a body, by whatever name called, incorporated by State law for the purposes of the State Government, but does not include a local authority.

G **[13]** It is not disputed that the second defendant is a legal entity created by the Menteri Besar Kedah Darulaman (Incorporation) Enactment No. 5 of 1988. As the second defendant was incorporated by State law, it is a statutory body within the definition of s. 4. And, as the second defendant does not appear in the First Schedule, it is my finding that the defendants are bound to comply with the 2003 Enactment in respect of the plaintiff's dismissal as H the plaintiff is the second defendant's employee.

(ii) Whether The Alleged Non-compliance Renders The Plaintiff's Dismissal Void?

[14] As the plaintiff's dismissal was premised on his alleged indiscipline, his dismissal must comply with the Regulations made under the 2003 I Enactment as s. 5 of the same provides as follows:

Application of Regulations

5. The regulations shall apply in respect of the discipline of officers of a statutory body.

These Regulations are laid down in the Second Schedule of the 2003 Enactment.

[15] Regulation 40 provides for the various punishments an officer of the second defendant can be subjected to if found guilty of a disciplinary offence. The range of punishment includes a dismissal.

[16] Under the Regulations, when a complaint of a breach of discipline arises, the Chairman of the appropriate Disciplinary Committee has to determine the seriousness of the alleged breach. If the said Chairman is of the view that it is a breach which warrants a punishment of dismissal or reduction in rank, he is obliged to refer the case to the appropriate Disciplinary Committee. This is in compliance with reg. 33 which provides as follows:

Chairman of Disciplinary Committee to determine nature of breach of discipline

33 (1) Where an officer is alleged to have committed a disciplinary offence:

(a) the Chairman of Disciplinary Committee appropriate to that officer; or

(b) if there is more than one tier of Disciplinary Committee in respect of such officer, the Chairman of Disciplinary Committee having the jurisdiction to impose a punishment other than dismissal or reduction in rank,

shall, before commencing any disciplinary proceedings in respect of the officer, consider and determine whether the disciplinary offence complained of is a nature of which warrants a punishment of dismissal or reduction in rank.

(2) If the Chairman of Disciplinary Committee referred to in sub regulation (1)(a) or (b) determines that the disciplinary offence complained of is a nature of which warrants a punishment of dismissal or reduction in rank, **he shall refer the case to the Disciplinary Committee which has the power to impose such punishment.**

(emphasis added)

[17] Pursuant to reg. 35, the appropriate Disciplinary Committee must then consider all the available information and determine whether there is a *prima facie* case against the officer. In the event that the Disciplinary Committee finds that there is, the Disciplinary Committee is required to

provide the officer concerned with the charge which must contain the facts of the alleged disciplinary offence committed and the grounds on which it is proposed to dismiss the officer.

The officer shall then be given 21 days from the day that he receives the charge to make written representation to exculpate himself for the consideration of the appropriate disciplinary committee. Regulation 35 provides as follows:

> **Procedure in disciplinary cases with a view to dismissal or reduction in rank**
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> 35 (1) If it is determined under regulation 33 that the disciplinary offence complained of against an officer is a nature that warrants a punishment of dismissal or reduction in rank, the appropriate Disciplinary Committee to which the case is referred shall consider all the available information.
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> (2) if it appears to the appropriate Disciplinary Committee that there exists a *prima facie* case against the officer, the appropriate Disciplinary Committee shall:
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> (a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer; and
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> (b) call upon the officer to make, within a period of twenty-one days from the date he receives the charge, a written representation containing the grounds upon which he relies to exculpate himself.
>
> (3) …
>
> (4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer made such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Committee, the Disciplinary Committee shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.
>
> (5) …

[18] Section 6 of the 2003 Enactment subjects each of the different categories of officers in the second defendant's employment to different Disciplinary Committees deemed appropriate to that particular category. The same provision also provides as to who should be the members of the said appropriate Disciplinary Committees. Section 6 reads as follows:

> **Disciplinary Authority**
>
> 6(1) The Disciplinary Authorities in respect of the various categories of officers shall be the Disciplinary Committees established in accordance with Part I of the Third Schedule and the provisions of that Part shall apply to, and be complied by, every Disciplinary Committee.

[19] By virtue of Part I of the Third Schedule, the appropriate Disciplinary Committee to inquire into the plaintiff's alleged breach of discipline should comprise of the State Secretary as the Chairman with the State Legal Adviser, the Deputy State Secretary (Administration) and two members of the Board to be appointed by the Chairman of the Board (the required panel members) as the plaintiff is in the management and professional group.

[20] However, in the plaintiff's case, no such Disciplinary Committee was constituted. Instead, on 5 February 2013, the plaintiff was directed to appear before:

> Suatu Panel Siasatan Dalaman yang dilantik oleh Defendan Kedua dan dipengerusi oleh seorang bernama En. Zulkifli dari Tetuan Aswandi Hashim & Co. Peguam bela & Peguam cara … bersama dengan dua orang yang lain sebagai ahli-ahli panel, seorang sebagai pendakwa dan seorang jurutrengkas.

[21] Cik Siti submits that this non-compliance in respect of the constitution of the Disciplinary Committee is immaterial as the appointment the legal firm, Messrs Aswandi Hashim & Co was consented to by the then Menteri Besar. The said consent was given by the Menteri Besar in his capacity as the Chairman of the second defendant's Board of Advisors. She, however, is unable to inform the court the legal basis for this purported delegation of duty and substitution of the Disciplinary Committee members.

[22] In *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169, disciplinary proceedings were taken against the appellant for failing to disclose certain evidence in a criminal trial. The evidence in question could have assisted the police in securing the conviction of the two accused persons in that criminal trial. Instead, the two accused persons were acquitted. He was dismissed by the Commissioner of Police subsequent to an enquiry. He challenged his dismissal a declaration that his dismissal was void, inoperative and of no effect as his dismissal was effected by an authority which had no power to dismiss him. The Privy Council held that it was clear that the power to dismiss lay in the hands of the person who had the power to appoint. Prior to Merdeka day, this power of appointment lay in the hands of the Commissioner of Police by virtue of s. 9(1) of the Police Ordinance 1952. However, post-Merdeka, arts. 140(1) and 144(1) of the Constitution vested this power in the Police Services Commission. Lord Denning delivering the decision of the Privy Council held (at p. 172)

> The result is that on 7th July 1958, the Police Services Commission was the authority to appoint an officer of the rank of Inspector Kanda: and therefore under Article 135(1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss Inspector Kanda as he did. The dismissal was therefore void. … Since their Lordships have

already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful.

[23] It is clear that there was a blatant breach by the defendants of s. 6 of the 2003 Enactment and reg. 35. The fact that Messrs Aswandi Hashim & Co stood in the place of the required panel members mentioned at para. 19 clearly meant that there was no appropriate Disciplinary Committee to inquire into the plaintiff's dismissal. It therefore follows that the plaintiff was never given a right to be heard before he was dismissed. The 'body' which determined his dismissal was obviously without powers to do so.

[24] The so-called delegation of powers by the Menteri Besar was illegal. In the first place, neither the 2003 Enactment nor the Regulations empowered the Menteri Besar to deal with the disciplinary proceedings at this stage. Apart from this, the Menteri Besar also did not have the legal powers to delegate or substitute Messrs Aswandi Hashim & Co in place of the appropriate Disciplinary Committee.

[25] The plaintiff's dismissal is therefore void.

[26] Cik Siti also contends that the plaintiff ought to have moved the court by way of a judicial review instead of filing the instant suit. To my mind, this is a non-issue. The body which dismissed the plaintiff is not a public authority for the purpose of O. 53. There has been a blatant breach of the Regulation. The so-called 'Disciplinary Committee' is not a Disciplinary Committee for the purpose of the law; it is just a group of individuals calling itself the 'Disciplinary Committee'. It has no legal standing. Indeed, it is an unlawfully constituted body. Thus, whatever 'decision' it makes has no legal consequences; it has no validity. Therefore, for the court to require that it is mandatory for the plaintiff to have proceeded by way of judicial review only under O. 53 and not by way of a writ action is misconceived and would be perpetrating an injustice. It tantamounts to giving that unlawfully constituted entity some degree of recognition which it does not deserve in the first place.

[27] Accordingly, encl. 15 is allowed with costs of RM6,000.